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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Telephone Number Portability	CC Docket No. 95-116

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Reply Comments of Bell Atlantic

Edward D. Young, III
Of Counsel

John M. Goodman
1133 20th Street, N.W.
Washington, D.C. 20036
(202) 392-1497

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Summary

Congress wanted the telecommunications industry to make number portability available to consumers. At a cost estimated to be $2.5 to 3 billion,[1] however, new entrants could not afford to pay for portability. Congress' solution was simple and was simply stated in section 251 — to spread the costs among all telecommunications carriers and to require the Commission to come up with a competitively neutral way of doing the spreading.

Many of the interests offering to help the Commission to satisfy this requirement must be honor graduates of the Humpty Dumpty School of Statutory Interpretation, who listened closely when their master told Alice, "When *I* use a word, it means just what I choose it to mean — neither more nor less." Bell Atlantic urges the Commission to stick to the plain meaning of the words of the statute and not to follow these commentors down the rabbit hole to a place where words have no meaning.

The statute says that "all carriers" must bear the costs of establishing number portability. A number of commentors want the Commission to rule that "all" does not mean "all," but rather means "some," or more specifically "anybody but me."

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1 AT&T at 13 n.17.

Similarly, the statute says that all carriers shall bear "[t]he cost of establishing . . . number portability." It does not say "some of the costs" or "certain costs" or "as little of the costs as we can get away with." And yet, many commentors argue that they must share in only a portion of the costs of number portability, while the bulk of those costs are left with the carriers that initially incur them, namely, the incumbent local exchange carriers.

It should be easy for the Commission to conclude that "all" means "all" and that "the costs" means "the costs." These simple decisions deal with most of the arguments and claims made in the comments.

The more substantial question raised by the statute is what is a "competitively neutral" way to apportion these costs, and the comments reveal no consensus on this issue. If there is any prevailing view, any view shared by representatives from all industry segments, it is that the allocation should be based on some measure of telecommunications revenues. Bell Atlantic favors allocation based on retail revenues, although gross revenues would be acceptable. Using gross revenues less payments to other carriers does not satisfy the Commission's own criteria of competitive neutrality in that it puts facilities-based carriers at an appreciable cost disadvantage compared to resellers. None of the proposals before the Commission is perfect,[2] but an allocation based on retail revenues is the one that best meets the statutory standard.

Bell Atlantic continues to believe that the Commission should look for a system that is simple, largely self-executing, does not require extensive oversight by the Commission or the States, and does not cost a fortune to administer — and, true to the statute, one that does not

[2] As GSA points out, basing the allocation on telecommunications service revenues disadvantages Centrex providers in competition with PBX providers, which would not contribute. GSA at 6.

competitively disadvantage any segment of the industry. The only plan that meets these requirements is the one suggested by Bell Atlantic, modeled on the Commission's TRS cost-recovery system. All number portability costs, both carrier-specific and shared, should be pooled on a nationwide basis. All telecommunications carriers should share in these costs in proportion to their retail telecommunications services revenues. No federal or state rate-making or other regulatory involvement would be necessary, except to deal with any complaints that carriers were underpaying or overcharging. Although not perfect, this system meets the statutory test of competitive neutrality and is consistent with the goal of the Telecommunications Act of 1996 to decrease the amount of regulation of the telecommunications industry.

"All" Means "All."

Everyone recognizes that number portability will be expensive.[3] Therefore, many commentors argue that they should not have to bear any part of these costs. The statute, however, places the obligation on "all telecommunications carriers," and none of the arguments by these parties can avoid that simple fact.

Some of the commentors are straightforward in their arguments that "all" does not mean "all." MCI, for example, says that only "local service providers participating in local number portability" should contribute,[4] while TRA would limit that obligation only to "local exchange carriers."[5] Sprint would reach the same result by asking that costs be allocated on the basis of "presubscribed local service lines."[6] PCIA argues that at least some of its members are not

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[3] AT&T estimates a cost of $2.5 to 3 billion. AT&T at 13 n.17.

[4] MCI at 3.

[5] TRA at 5.

[6] Sprint at 6.

included in the scope of "all telecommunications carriers,"[7] even though those members plainly are telecommunications carriers as defined in the Act.

Other commentors reach this same result indirectly. AT&T and Scherers argue that carriers should pay based on their usage of shared number portability facilities.[8] If a carrier does not use these facilities, then it avoids making the contribution that the statute plainly requires. Of course, even a carrier that does not use these facilities benefits from them because they ensure that its calls are delivered to the right place.

California argues that the meaning of "all telecommunications carriers" differs depending upon what costs are involved.[9] Apparently, not only does "all" not simply mean "all," but the size of "all" can change with the context.

There can really be no legitimate dispute about whether "all" means "all" in section 251(e)(2). Congress knew how to distinguish between different types of carriers — section 251(a) places certain obligations on "telecommunications carriers," section 251(b) places additional obligations on "local exchange carriers" and section 251(c) places still more on "incumbent local exchange carriers." Congress did not forget these distinctions when it got to section 251(e).

Moreover, Congress knew how to give the Commission the power to exempt carriers from obligations Congress imposed in the Act and did not do so here.[10] For example, in section 254(d), Congress required "every telecommunications carrier" to contribute to the

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[7] PCIA at 5.

[8] AT&T at 7-9; Scherers at 2-3. Similarly, Omnipoint wants all costs to be recovered through a charge for every query to the portability database. Omnipoint at 1-3.

[9] California at 5.

[10] The Commission must, therefore, reject suggestions that it can exempt carriers from their obligations under section 251(e)(2). ALTS at 2; Time Warner at 3, 5 n.9.

preservation of universal service. In the next sentence, Congress gave the Commission authority to "exempt a carrier or class of carriers" from this obligation, under circumstances spelled out by Congress. The fact that there is no similar language in section 251(e)(2), giving the Commission the power to exempt individual carriers or classes of carriers, reinforces the conclusion that Congress intended "all telecommunications carriers," without exception or exemption, to bear the costs of number portability.

"The Costs" Means "the Costs."

The statute requires the Commission to devise a system that will result in all carriers' bearing the costs of establishing number portability. This system must cover all number portability costs, not just certain of those costs. This is the approach taken by the Commission in the Further Notice.

However, many companies which do not have to spend much money to establish portability argue that each carrier should bear its own costs and that individual carrier's costs should not be included in the cost-recovery system the Commission is required to create under section 251(e)(2).[11] The only costs covered by that provision, they argue, are those associated with facilities that are shared by the industry as a whole, such as the costs of the service management systems. The statute does not make this distinction, or permit the Commission to do so.

The main argument made by these commentors is that "in a truly competitive environment," every competitor is responsible for its own costs, and one company does not

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[11] *E.g.*, AT&T at 12; MCI at 9-10; ALTS at 6; TCG at 3; MFS at 3; Time Warner at 13-14.

reimburse another.[12] Even if this observation were true, the words of the statute make it irrelevant here.

First, in a "truly competitive environment," every carrier would be able to charge a market based price for porting numbers. Under this approach, incumbent local exchange carriers would get to set whatever price the "truly competitive" market would bear for portability. And that price would likely result in its competitors' reimbursing the incumbent for its costs to provide portability. We doubt, however, whether these same commentors would endorse this "truly competitive" approach.

Second, if Congress had wanted to leave number portability cost recovery to the competitive marketplace, it would have done so, and it would not have written section 251(e)(2) into law. This section, however, requires a departure from reliance on market forces. Arguments based on what might happen in some unregulated, competitive market are not relevant here where the Commission is required to regulate under a specific congressional standard.

Another common refrain is that carriers will deploy number portability inefficiently if they can get some of their costs back.[13] None of these commentors suggest how this "gold-plating" of number portability could be accomplished or why any carrier would want to do it, even if it did not cost that carrier a dime.

Moreover, the facts disprove these commentors' speculative theories. Perhaps the main debate over how number portability is to be deployed concerns Query on Release, a capability that many incumbent exchange carriers want to use in order to reduce the cost of number

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[12] *E.g.*, Sprint at 8; Omnipoint at 4-5; MFS at 3-4.

[13] *E.g.*, AT&T at 12-14; Time Warner at 13-14.

portability. It is probably not surprising that many of those who want carriers to bear their own costs also oppose the incumbents' efforts to reduce those costs.

TCG opposes cost sharing because it would require TCG to undertake "burdensome cost studies" which would undermine its ability to compete[14] It is unclear to Bell Atlantic just why it is such a burden to keep track of what you spend on number portability. In any event, whatever the economic burden, it is insignificant compared to the multi-billion dollar burden the Act requires incumbents to bear in order to provide TCG with the form of portability it says it wants and, presumably, is small even compared to TCG's own portability costs. It is certainly no reason not to follow the mandate of the statute to devise a system that recovers all costs.

MFS claims that allowing the recovery of carrier-specific costs would give carriers the opportunity to misallocate expenditures for general network upgrades to number portability.[15] The Commission made the same distinction between network upgrades and service-specific costs in connection with 800 database access, and there has been no problem of the type MFS fears.

A Competitively Neutral System

A national pool. In its comments, Bell Atlantic proposed national pooling of all number portability costs.[16] The comments reinforce the benefits of national, rather than regional or state-by-state recovery. No one has suggested any good reason to create numerous regional or State cost pools, and the added costs and complications of doing so plainly outweigh whatever theoretical benefits might derive from "localizing" cost recovery.

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[14] TCG at 8.

[15] MFS at 3-4.

[16] In section 251(e)(2), Congress required the Commission to establish cost recovery rules, a mandate that is very different from that of sections 251(b), 251(c) and 252 which give jurisdiction to the States.

For example, Sprint argues that it is difficult to obtain revenue data below the national level.[17] AirTouch describes the special problems of regional cost recovery mechanisms for wireless carriers, whose service areas bear no relation to landline regions or even to States.[18] A single national pool will simplify matters for all involved.

Contribution based on revenues. There is support from all segments of the industry to use revenues as the basis of allocation. Even TCG, once one of the strongest proponents of a non-revenues-based approach, now support using revenues.[19] The proposals to use allocators other than revenues are generally offered by carriers which will eliminate or greatly reduce their contribution under the other method, and they are, in TCG's phrase, "clearly inequitable." These proposals are also inconsistent with the statutory requirements that "all telecommunications carriers" contribute and that the system be "competitively neutral."

The alleged difficulties in using revenues are trivial. AT&T, the telecommunications carrier with more revenues than anyone else, perhaps predictably opposes allocation on the basis of revenues because of "several significant implementation issues."[20] As examples, AT&T lists such problems as that the Commission would have to determine whether "unswitched private line services" produce "telecommunications" revenues.[21] If this is the best

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[17] Sprint at 7. Sprint makes this point in the context of arguing against using regional revenues as the basis of the cost allocation and for using numbers of lines instead; however, what Sprint's argument really suggests is the use of national revenues to allocate a nationwide pool of costs.

[18] AirTouch at 6-7.

[19] TCG at 5 (noting that TCG had previously advocated allocation based on number of access lines).

[20] AT&T at 9.

[21] AT&T at 10 n.13.

argument that the biggest carrier in the nation can come up with, the Commission's proposal to use revenues to allocate costs must be a sound one.

Retail revenues are the best allocator. Bell Atlantic showed in its comments that retail revenues were the best measure of a telecommunications carrier's position in the marketplace. It also demonstrated that using gross revenues less amounts paid to other carriers created competitive disparity and was, therefore, inconsistent with the statutory standard.

For example, under this proposal, Bell Atlantic would be required to contribute to the costs of number portability based on the total revenues from sales of wholesale services, while section 252(d)(3) could prevent Bell Atlantic from recovering this cost from its reseller-customer, and Bell Atlantic would be forced to seek recovery from its remaining end user customers. The reseller, by contrast, would not contribute on this basis, but only on a fraction of the revenues it receives — only on the "profit" over what it paid Bell Atlantic for the service. This would create a double competitive disparity. First, in head-to-head competition for the same customer, this plan would put Bell Atlantic at an appreciable cost disadvantage to the reseller. Second, Bell Atlantic would also be at a cost disadvantage when competing with other carriers for the business of other customers, because it has to recover from those customers the contribution it made on the service it sold to the reseller under section 251(c)(4).[22]

Again predictably, carriers that make significant payments to other carriers — resellers, including interexchange carriers that resell exchange access — support the Commission's

[22] The same disparity would result if the carrier bought network elements from Bell Atlantic, as it is not clear that the Commission's TELRIC methodology would permit Bell Atlantic to recover a portion of its number portability contribution as a cost of providing the network element. It is also far from clear whether the States would permit such recovery under the rules they adopt.

proposal.[23] None of these supporters, however, address Bell Atlantic's concern that this system is unfair to the wholesaler.

Some commentors ask the Commission to modify the plan described in the Further Notice in a way that would exacerbate this disparity. These carriers want to prohibit incumbent exchange carriers from recovering number portability costs through charges collected from other carriers.[24] Such a restriction would eliminate the justification offered by the Commission and others[25] for adjusting a carrier's revenues to remove the amounts paid to other carriers — that the carrier selling a service to another carrier will be recovering some costs of number portability from its carrier customer (a justification, we pointed out, was factually incorrect). These carriers certainly cannot have it both ways — if revenues is used as the allocator, they cannot deduct the amounts they pay to Bell Atlantic and prohibit Bell Atlantic from recovering some of its costs from them.

<u>End User Charges</u>

The best way to ensure that carriers cannot use number portability costs to get a competitive advantage is to require all carriers to pass their share of these costs on to end user

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23 *E.g.*, Winstar at 3; TCG at 5-6; Nextel at 5; MFS at 6-7.

24 TCG at 12; MFS at 4; ALTS at 5; AT&T at 10-11.

25 TCG at 6.

customers in the same way. Bell Atlantic's proposal was that these costs be passed on in proportion to the revenues billed to end users.[26]

TCG opposes end user charges because they would "promote hostility to number portability as a concept."[27] ALTS echoes this theme in claiming that explicit end user charges are "inherently disparaging."[28] These are truly flabbergasting arguments. The entire premise behind ordering the deployment of number portability is that consumers want it. The fact that they are getting it should not make them "hostile." Moreover, it is unclear why this hostility would be directed at the new competitors or that these new entrants would be disparaged when the surcharges appear on bills *sent by the incumbents*. Finally, if the per line cost of portability is actually "modest" as AT&T asserts,[29] there should be no hostility to begin with.

Some commentors oppose any requirement that cost be passed on to end users, arguing that carriers should have the flexibility to do as they choose in "a competitive environment."[30] As noted above, Congress decided that normal rules of a "competitive environment" should not govern the pricing of number portability.

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26 All carriers with subscribed customers — such as local exchange carriers, toll carriers with presubscribed customers and CMRS providers — recover their costs through a separately stated charge on these customers' monthly bills. This charge would be a proportion of the total telecommunications revenues billed. Carriers which do not have subscribed customers and other carriers to the extent they receive telecommunications revenues from non-subscribers should also recover their costs in proportion to the revenues billed.

27 TCG at 10.

28 ALTS at 4.

29 AT&T at 13 n.17.

30 TCG at 10. Also, Scherers at 4-5; Nextel at 4.

Conclusion

Normal regulatory principles that cost causers pay would require that new entrants bear the full cost of number portability. Congress made the policy judgment that, in order to encourage local service competition, the normal rules should not apply and that all telecommunications carriers should share in these costs in a way that does not tilt the competitive balance. In developing the plan to accomplish this, the Commission should not go too far in the other direction and saddle the incumbent exchange carriers with the lion's share of these costs, either by excusing some carriers from contributing, excluding some costs from the pool to be shared, or allocating the costs based on a formula that disadvantages carriers that rely on their own facilities rather than on reselling those of others.

The Commission also has an opportunity to create a simple, non-regulatory system for apportioning these costs. Many commentors instead urge the Commission to stay with the traditional regulators' approach of recovering different costs through different charges, allocating costs among services, establishing rate elements and the like. Bell Atlantic urges the Commission to show that it can break out of this traditional mindset and to complete the job that

Congress gave it in a way that does not look to models from the past to take us to the competitive market of the future.

Respectfully submitted,

John M. Goodman

John M. Goodman
Attorney for Bell Atlantic

Edward D. Young, III
Of Counsel

1133 20th Street, N.W.
Washington, D.C. 20036
(202) 392-1497

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Competitive Pricing Division *
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

(2 copies)

ITS, Inc.*
Room 140
2100 M Street, N.W.
Washington, D.C. 20037

Wanda M. Harris *
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 1996 a copy of the foregoing "Reply Comments of Bell Atlantic" was sent by first class mail, postage prepaid, to the parties on the attached list.

Jonathan R. Shipler

Jonathan R. Shipler

* By Hand